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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 57

EASTERN TRANSPORTATION COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES

OPINION OF THE COURT BELOW

The District Court first filed an opinion denying the Government's motion to dismiss the libel filed under authority of the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525), for lack of jurisdiction (R. 6–8), which is reported in 283 Fed. 1015. It reserved for further consideration the question whether, as the *Snug Harbor* at the time the cause of action arose was a total loss and no suit *in rem* could have been maintained, a libel based upon *in personam* liabilities would lie against the United

States under authority of that Act. Later the court reheard and reconsidered the motion to dismiss and filed an order denying jurisdiction and dismissed the libel (R. 9). The order reads:

> It appearing from the libel filed herein that prior to the time of the injury complained of in said libel the steamship *Snug Harbor* had been sunk and at the time of such sinking became and was a total loss; and the Court being of the opinion that on the facts alleged in the libel it is without jurisdiction of this case, doth sustain the suggestion of want of jurisdiction * * *.

JURISDICTION

The decree to be reviewed was entered January 30, 1925. This direct appeal was taken March 20, 1925. (R. 10.) The certificate of the District Judge (R. 9) is:

> The sole issue before the Court was as to its jurisdiction as a United States District Court sitting in admiralty, and whether it had jurisdiction over the United States in said cause, and it being of opinion that it was without jurisdiction because it was alleged in the libel that before the time of the injury complained of in the said libel the S. S. *Snug Harbor* had been sunk and had then and there become and was a total loss, the suggestion of the United States was sustained and the proceedings dismissed as to the United States. The sole question decided by the court was as to its jurisdiction.

The jurisdiction of this Court is based on Section 238 of the Judicial Code as it stood prior to the Act of February 13, 1925 (c. 229, 43 Stat. 936).

THE QUESTION

The question presented is whether the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525), authorized a libel *in personam* against the United States to recover for loss of a barge by collision with the submerged wreck of a Government vessel based upon its alleged breach of duty in failing to mark and buoy such wreck, where previously the Government vessel had been sunk and then had become a total loss and the breach complained of was not that of a merchant vessel but of the Government as its former owner.

STATEMENT

Under the supposed authority of the Suits in Admiralty Act, the Eastern Transportation Company on July 26, 1921, filed its libel (R. 1) against the United States as owner of the steamship *Snug Harbor* and the Seaboard Transportation Company as owner of the tug *Covington* and the barge *Pottsville*, to recover for loss of its barge *Winstead*. On August 15, 1920, at 9.30 p. m., while the *Snug Harbor*, then owned by the Government and employed as a merchant vessel, was en route from Baltimore, Maryland, to Portland, Maine, she was in collision with the barge *Pottsville* in tow of the tug *Covington*, as a result of which the *Snug Harbor* was sunk

and *"then and there, became a total loss"* (R. 1). On September 14, 1920, about a month later, the barge *Winstead* in tow ran upon the wreck of the *Snug Harbor* and became a total loss. (R. 2.)

The libel alleges the first collision between the *Snug Harbor* and the *Covington* and *Pottsville* resulted through the negligence of both vessels, that by that collision the *Snug Harbor "was sunk, and then and there became a total loss,"* and that the wreck of the *Snug Harbor* thereafter was not marked with a buoy or beacon by day or by a lighted lantern by night and was not removed by the United States or the Seaboard Transportation Company and no published notice had been given advising mariners navigating those waters of the presence of the wreck. (R. 1–3.) Liability is rested upon the theory that the Seaboard Transportation Company and the Government were "jointly and severally responsible for the presence of the wreck of the steamship *Snug Harbor,* and because of their failure to mark, buoy or remove the same, for the damages resulting in the loss of the barge *J. H. Winstead* and her cargo." (Libel par. 10, R. 3.)

The United States appeared specially and filed its suggestion of want of jurisdiction (R. 4, 5) and moved to dismiss the libel, assigning the following reasons:

> 1. The said alleged cause of action set out in the said libel relates to an alleged failure on the part of the officers and/or agents of

the United States to perform a purely governmental function or to alleged negligence of such officers and/or agents in the performance of a purely governmental function; and gives rise to no liability on the part of the United States of America for which they are suable in the United States Court or elsewhere.

2. *The said alleged cause of action relates to an alleged failure to mark the position of a wreck and in nowise concerns a vessel employed as a merchant vessel.* (Italics ours.)

3. The purpose of the Act of Congress approved March 9th, 1920, known as the "Suits in Admiralty Act," was to prevent the arrest and detention of vessels owned and/or possessed by the United States and then employed as merchant vessels and it was only to prevent such arrest and detention and the consequent interference with the operation of such vessels that the United States consented by the said Act to be sued in respect to such vessels. They have never consented by said act, or otherwise, to be sued in respect to a wreck or any object incapable of being employed as a merchant vessel.

4. The suit *in personam* provided for and permitted by the above-mentioned "Suits in Admiralty Act" was intended by Congress to be and is only a substitute for a suit *in rem* against the vessel itself and by the terms of said Act can be brought and maintained

only in cases where if such vessel were privately owned a suit *in rem* could be maintained against her at the time of the commencement of such action and not then unless such vessel "is employed as a merchant vessel" at that time.

5. Section 15 of the Act of March 3, 1899, making it the duty of the owner of any vessel or craft wrecked and sunk in a navigable channel immediately to mark it with a buoy or beacon by day and a lighted lantern at night, has no application to the United States of America, imposes no duty upon them and creates no liability for which they are suable in this Court or elsewhere.

The libel against the Seabord Transportation Company since has been discontinued.

After hearing, the District Judge (Groner, D. J.) filed a written opinion (R. 6–8), sustaining the contention of the libelant that by virtue of the Suits in Admiralty Act, the United States had been brought within the provisions of the Act of March 3, 1899 (c. 425, 30 Stat. 1121, 1152), and had consented to be sued for any liability that occurred in consequence of its failure to comply with Section 15 of the latter Act. This Act appears at pages 76–81 of the appellant's brief and imposes a duty upon owners of vessels to mark wrecks unless their abandonment to the Government has been established. The court, however, reserved for future consideration the question whether, as the *Snug Harbor* prior

to the loss of the *Winstead* had been sunk and at the time of sinking became and was a total loss, there was jurisdiction to maintain the libel under authority of the Suits in Admiralty Act. (R. 8.) A rehearing was had and the court filed its order of judgment (R. 9), that as the *Snug Harbor* at the time of the injury to the *Winstead* was not a merchant vessel but previously had been sunk and become a total loss, the court was without jurisdiction of the case. This appeal followed.

While the libel states that the collision in which the *Snug Harbor* sank was due to the joint fault of that vessel and the tug *Covington,* it is apparent that this is not a ground for recovery against the United States. Manifestly it is too remote. The sole ground, we understand, urged in the court below for holding the United States liable was its failure to mark or remove the wreck as required by the Act of March 3, 1899. Then the *Snug Harbor* was not a merchant vessel. She had been sunk and had become a total loss thirty days previously. This suit is not brought against the United States as a substitute for an *in rem* action against the vessel. It asserts no liability of the vessel itself. It seeks to hold the United States liable for an alleged tort—an original personal tort—in failing to mark by buoy the wreck of the *Snug Harbor.* As the *Snug Harbor* was not a merchant vessel either at the time the loss happened or the libel was filed, it is clear to us that the ruling of the District Court was proper.

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SUMMARY OF ARGUMENT

I. The libel alleges that the vessel of the United States became a total loss by the first collision. She thereupon ceased to be a merchant vessel. The Suits in Admiralty Act, in its most liberal interpretation, must be read to grant relief against the United States for tort and contract losses arising out of or incident to the possession, ownership, or operation of merchant vessels only. As at the time of the loss of the barge *Winstead,* the *Snug Harbor* was not a merchant vessel—the basis of the claim is failure of the Government to mark the wreck—the Suits in Admiralty Act does not provide relief. The claim is a tort for which the Government has not consented to be sued.

II. If the Suits in Admiralty Act is to be read only to permit a proceeding against the United States in lieu of a libel against its merchant vessels to enforce a liability against the vessel, it must be conceded the Act does not provide relief. Relief thus is limited to instances where the vessel, if privately owned, could have been proceeded against *in rem,* and the vessel at the time of the loss and at the time the libel is filed is employed as a merchant vessel. The liability asserted in the libel is failure of owners to mark the wreck. This is not the liability of the vessel or even of the wreck of the vessel, but a liability of the officers or representatives of the United States for failure to perform an alleged duty. This suit was not authorized by the Suits in Admiralty Act.

THE STATUTES INVOLVED

The Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525) appears as an appendix to appellant's brief, page 73. Its pertinent provisions are:

> *Be it enacted* * * * That *no vessel owned by* the United States * * * shall hereafter, in view of the provision herein made for a libel *in personam, be subject to arrest or seizure by judicial process* in the United States or its possessions. * * *
>
> SEC. 2. That in cases where *if such vessel were privately owned* or operated * * * *a proceeding in admiralty could be maintained at the time of the commencement of the action* herein provided for, a libel *in personam* may be brought against the United States * * * *provided that such vessel is employed as a merchant vessel* * * *. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, *or in which the* vessel or cargo charged with liability is found. (Italics ours.)
>
> SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * * If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever

it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

Section 9 of the original Shipping Act of 1916, approved September 7, 1916 (c. 451, 39 Stat. 728, 730), provided:

Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and

> license. Such vessels while employed solely as merchant vessels *shall be subject to* all laws, regulations, and *liabilities* governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (Italics ours.)

The Act of March 3, 1899 (30 Stat. 1152), which requires owners of wrecks to mark and buoy the same, unless abandoned to the Government, appears in full as an appendix (p. 76) to the Appellant's Brief.

ARGUMENT

APPLICATION OF SUITS IN ADMIRALTY ACT

We construe the Act in any view to require the vessel concerning which liability is asserted to have the status of a merchant vessel at the time the loss occurs. It must be conceded the *Snug Harbor* did not have such status at the time the *Winstead* struck her wreck. If the Act be read to require the vessel to have the status of a merchant vessel at the time the libel is filed, this action can not be maintained, as the *Snug Harbor* had become a total loss nine months previously. The District Court concluded it did not have jurisdiction of the United States under authority of the Suits in Admiralty Act because the *Snug Harbor* did not have the status of a merchant vessel at the time the loss in suit happened. The appellant urges this as error and asks that the Act be applied so as to per-

mit any action in admiralty against the Government to be filed whenever like relief upon the same cause of action could be had between private parties. We admit that, as between private parties, relief is properly had by libel *in personam* for failure to mark and buoy a wreck in navigable inland waters.

Four constructions of the Suits in Admiralty Act may be stated:

1. The Act substitutes a remedy *in personam* for the enforcement of the same liability which in the case of privately-owned vessels would be enforced by a proceeding *in rem*.

2. The Act provides a remedy both upon principles of *in personam* liability and of *in rem* liability where the vessel involved at the time the cause of action arose was employed as a merchant vessel. If based upon principles of *in personam* liability, it must be limited to liabilities growing out of the possession, ownership, or operation of the vessel in merchant service; if based upon *in rem* liability, the offending vessel must have the status of a merchant vessel.

3. The Act imposes the same measure of relief as is had against private parties.

4. The right to any relief under the Act is conditioned upon the vessel concerned having the status of a merchant vessel at the time the libel is filed and such vessel then being within the United States or its possessions.

FIRST CONSTRUCTION

Section 9 of the original Shipping Act of 1916, approved September 7, 1916 (c. 451, 39 Stat. 728, 730), provided:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels *shall be subject to* all laws, regulations, and *liabilities* governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (Italics ours.)

This Court in *The Lake Monroe* (250 U. S. 246), construed this section as subjecting merchant vessels purchased, chartered, or leased by the Government in merchant service to arrest or seizure for the enforcement of maritime liens. To avoid the arrest and detention of Government merchant vessels and the filing of stipulations for their release when attached, the Suits in Admiralty Act was proposed. Section 1 of the original draft as it stood when under discussion before the Senate Committee provided:

> That the United States and any corporation in which the United States owns not less than a majority of the capital stock, may be sued *in personam* in the district courts of the United States, in admiralty, for any cause of action of which said courts

> ordinarily have cognizance in their admiralty and maritime jurisdictions, arising, since April 6, 1917, out of, or in connection with, the possession, operation, or ownership by the United States, or such corporation, of any merchant vessel, or the possession, carriage, or ownership by the United States, or such corporation, of any cargo, in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of the suit. Any such suit shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, or in the district in or nearest which the cause of action arises. (See Hearing before the Committee on Commerce, United States Senate, Sixty-sixth Congress, first session on S. 2253.)

But this broad language was rejected and in its place was substituted the restricted wording of Sections 1 and 2 of the present Act.

The Committee on the Judiciary of the House in reporting the Bill with certain amendments said:

> The object of this bill is not to add to the liability of the Government, but to prevent

the seizure and detention of our ships, so as to eliminate this unnecessary loss. (See Report No. 497, House of Representatives, Sixty-sixth Congress, 2d Session.)

The legislative history of the Act appears by footnote.[1]

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[1] *History of Act.*—The original bill, known as S. 2253, was introduced in the Senate on June 26, 1919, and referred to the Committee on Commerce (66th Congress, 1st sess., Cong. Rec. vol. 58, pt. 2, p. 1784). On July 9, 1919, the same bill was introduced in the House as H. R. 7124 and referred to the Committee on the Judiciary (Cong. Rec. vol. 58, pt. 3, p. 2334). On August 28, 1919, the Committee on Commerce of the Senate held hearings on S. 2253. See report of hearing before the Committee on Commerce, United States Senate, S. 2253, upon which the committee submitted its report (No. 223, 66th Congress, 1st sess.), by which it reported back a new bill, No. 3076 (Cong. Rec. s. v., pt. 6, p. 6017). This bill was debated in the Senate (Cong. Rec. s. v., pt. 7, pp. 7317, 7439, 7440) and passed the Senate and was referred to the House and by it referred to the Committee on the Judiciary (Cong. Rec. s. v., pt. 8, p. 7538). The Committee on the Judiciary of the House held hearings on H. R. 7124, serial No. 4, and also on a substitute bill known as the Attorney General's substitute, which hearings are fully reported by serial 8, dated November 13, 1919, of the House Committee on the Judiciary.

On December 12, 1919, the Committee on the Judiciary submitted to the House its report (House Report No. 497), reporting the bill in a different form (Cong. Rec. 66th Congress, 2nd Sess., vol. 59, pt. 1, p. 498). This report was debated (Cong. Rec. s. v., pt. 2, pp. 1678–1693, 1750–1759). The bill went to conference and the conference report, amending the bill as passed by the House, was reported (Senate Document No. 233) to the Senate (Cong. Rec. s. v., pt. 4, p. 3350), and agreed to by the Senate (Cong. Rec. s. v., pt. 4, pp. 3690, 3691). It was also submitted in the House as House Report 669 (Cong. Rec. s. v., pt. 4, p. 3629), agreed

The Act and its history evidences no intention to make the United States liable for torts generally or to subject it to the same duties and obligations as rest upon private owners of vessels. The general purposes of the Act have been stated by this Court. In *Blamberg Bros.* v. *United States* (260 U. S. 452, 458), it said:

> This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe,* 250 U. S. 246. It was intended to substitute this proceeding *in personam,* as the first section of the act expressly indicates, in lieu of the previous unlimited right of claimants to libel such vessels *in rem* in the ports of the United States and its possessions.

Again, in *James Shewan & Sons, Inc.,* v. *United States,* 266 U. S. 108, 111, 112, this Court said:

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to by the House (Cong. Rec. s. v., pt. 4, p. 3631), examined and signed (Cong. Rec. s. v., pt. 4, pp. 3864, 3883), approved by the President March 9, 1920 (Cong. Rec. s. v., pt. 4, p. 4068), and became Public Act No. 156 (41 Stat. 525).

The hearings before the Committee on Commerce in the Senate were printed as of Thursday, August 28, 1919, while the hearings before the Committee on the Judiciary of the House were printed, the first hearing being Serial 4, dated August 28, 1919, and the second hearing being known as Serial 8, dated November 13, 1919.

> This act was enacted chiefly for the purpose of relieving the United States from obstruction to its commercial traffic by the seizure of merchant vessels owned by it or under its control, and was intended to substitute an *equivalent* (italics ours) remedy against the United States *in personam* for the right *in rem* against the vessel, which the Act of September 7, 1916, sec. 9, c. 451, 39 Stat. 728, had permitted. * * *
>
> In view of the purpose of Congress, in the Act of 1920 merely to substitute for an action *in rem* an action *in personam,* the natural construction would be one which, *ceteris paribus,* would measure the extent of the right to sue the United States *in personam* by that which had been granted in the Act of 1916 to sue *in rem* its offending or responsible vessel. The date of natural importance in fixing the liability *in rem* would seem to be that of the event out of which the liability grew. The date of the suit would be important only in the application of a statute of limitation or a change in character of the vessel from that of a merchant vessel to public vessel, or possibly some kind of a change in ownership or the happening of some other circumstance after the event which would exempt the offending vessel if privately owned from seizure under the rules of admiralty law.

If the right to sue the United States *in personam* is to be measured by that which had been granted by Section 9 of the original Shipping Act of 1916

to sue the offending vessel *in rem*, then no suit will lie in this case. The *Snug Harbor* prior to the injury complained of had become a total loss. She had ceased to exist as a merchant vessel. She had lost the personality ascribed by immemorial usage to ships and lay a mass of unrelated materials on the bottom of the sea. Not for anything that this inert mass of steel had done was this suit brought but for failure of the United States as her owner to mark its position. The liability asserted by the libel is not a liability of a vessel or even of the wreck of a vessel but the personal liability of the United States for failure to perform an alleged statutory duty.

It is not questioned that under the Suits in Admiralty Act, where all the statutory requisites concur, a suit may be brought against the United States in lieu of a suit against a merchant vessel owned by the United States to enforce a liability of the vessel, whether that liability be based upon contract or upon tort. But if founded upon tort, it is the tort of a vessel employed as a merchant vessel and not the personal tort of the United States.

SECOND CONSTRUCTION

Certain lower courts have construed the Act as providing relief upon principles of *in personam* liability as well as upon principles of *in rem* liability. They reason that the language of Section 2—"a proceeding in admiralty could be maintained"—

should have full and liberal construction and so construed, permits libels both *in personam* and *in rem* to be filed. The cases are collected in the footnote.[1] *Agros Corp.* v. *United States*, 8 F. (2d) 84, and *The Isonomia* (C. C. A. 2nd Cir.), 285 Fed. 516, are considered well-reasoned decisions. The view is that Section 1 prohibits "arrest or seizure by judicial process" of any Government vessel. Section 2 provides for a proceeding in admiralty in cases "where if such vessels were privately owned or operated * * * a proceeding in admiralty could be maintained." Arrest ordinarily is a taking under admiralty process *in rem*—the writ is called

[1] *The Isonomia*, C. C. A. 2nd, 285 Fed. 516; *Bashinsky Cotton Co., Inc.*, v. *United States* (D. C. S. D. N. Y., Mack, C. J.), 8 F. (2d) 79; *Atlantic Fruit Co.* v. *United States* (D. C. S. D. N. Y., Winslow, D. J.), 8 F. (2d) 81; *Agros Corporation* v. *United States* (D. C. S. D. N. Y., Learned Hand, D. J., now C. J.), 8 F. (2d) 84; *Cross* v. *United States* (D. C. S. D. N. Y., Goddard, D. J.), 8 F. (2d) 86; *The Elmac* (D. C. S. D. N. Y., Augustus N. Hand, D. J.), 285 Fed. 665; *Tug Nonpareil* (D. C. S. D. N. Y., Ward, C. J.), 1924 A. M. C. 312; *Sutherland & Co., Inc.*, v. *United States* (*Eastern Mariner*) (D. C. S. D. N. Y., Ward, C. J.), 1924 A. M. C. 996; *Grays Harbor Stevedoring Co.* v. *United States* (D. C. W. D. Wash., Cushman, D. J.), 286 Fed. 444; *Western Lumber Mfg. Co.* v. *United States* (D. C. N. D. Calif., Kerrigan, D. J.), 9 F. (2d) 1004; *The Anna E. Morse* (D. C. S. D. Ala., Ervin, D. J.), 287 Fed. 364; *Markle* v. *United States* (D. C. S. D. Texas, Hutcheson, D. J.), 8 F. (2d) 87; *Middleton & Co.* v. *United States* (D. C. E. D. S. C., H. A. M. Smith, D. J.), 273 Fed. 199. Contra: *Banque-Russo Asiatique-London* v. *Fleet Corp.* (D. C. E. D. Pa., Thompson, D. J.), 266 Fed. 897; *W. R. Grace & Co.* v. *United States* (D. C. S. D. N. Y., Knox, D. J.), 8 F. (2d) 80; *Villigas* v. *United States* (D. C. E. D. N. Y., Garvin, D. J.), 8 F. (2d) 300.

a "warrant of arrest." Seizure by judicial process includes the taking by judicial process under attachments other than arrest by an admiralty warrant. The phrase "proceeding in admiralty," ordinarily comprehends proceedings *in personam* as well as those *in rem*. Section 6 accords to the Government "the benefits of all exemptions and of all limitations of liability accorded by law" to private owners. The liability against which these limitations and exemptions are preserved is personal to the owner. These decisions suggest that the opinions of this Court in *Blamberg* v. *United States*, 260 U. S. 452; *Shewan & Sons* v. *United States*, 266 U. S. 108; and *Nahmeh* v. *United States*, 267 U. S. 122, must be limited to the questions presented. Each of the suits are based on *in rem* liabilities. The question in the first was whether an *in rem* suit would lie under the Act when the vessel was not within the United States; in the second, when the vessel was not "actually engaged in mercantile trade" and in the third, when the vessel was not within the district in suit.

The proviso of Section 2 is "provided that such vessel is employed as a merchant vessel." This limitation, if the construction now suggested is sound, requires the cause of action, if based upon *in personam* rights, to be related to the ownership, possession, or operation of a merchant vessel. However, in this case at the time of the loss of the *Winstead*, the *Snug Harbor* had been sunk and totally lost and her identity as a vessel destroyed.

THIRD CONSTRUCTION

This is the construction of the Act which the appellant here urges. It is that the Act permits suit against the Government on the admiralty side of the court both upon *in personam* and *in rem* liabilities in the same full measure that such actions are maintainable as between private parties. We deny such construction of the Act can be had. Section 2 reads:

> That in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States * * * provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.

The proviso—"provided that such vessel is employed as a merchant vessel"—in plain terms, if the proceedings can be asserted under the Act upon principles of *in personam* liability, requires that the cause of action be related to or grow out of the operation of Government vessels employed as merchant vessels. This is its plain meaning.

This construction of the Act is unsound, whether the Act be given a strict or liberal application. The cause of action must relate to or concern a vessel employed in merchant service. At the time the barge *Winstead* was lost, the *Snug Harbor* was not "employed as a merchant vessel."

FOURTH CONSTRUCTION

It has been suggested that the right to any relief under the Act is conditioned upon the vessel concerned having the status of a merchant vessel at the time the libel is filed and such vessel then being within the United States or its possessions. This libel was filed nine months after the *Snug Harbor* was lost. Upon such construction, relief under the Act has been denied:

W. R. Grace & Co. v. *United States.* 8 F. (2d) 80.

Villigas v. *United States,* 8 F. (2d) 300.

It is suggested, though we can not believe seriously, that this suit can be maintained because, at the time of its commencement, a suit *in rem* might have been maintained against the wreck of the *Snug Harbor.* It is to be observed it was not to enforce any liability of the wreck that the suit was brought. The gravamen of the complaint is the failure of the owner to mark the position of the wreck. No suit *in rem* against the wreck would have been possible. For such proceeding to be maintained, the court of admiralty must have the custody of the *res.* It must have under its control and subject to its disposition something of substance and value. In this case there was no *res.* The total loss of the *Snug Harbor* implies that efforts to salvage the vessel would have been futile, or at least would have cost more than the salved materials, if any, were worth.

No attachment could have been served on the wreck. To take it into custody would have been impossible. No court could possibly have acquired jurisdiction over it, and certainly no court would have thought of attempting to do so. In any view, the *Snug Harbor* then did not have the status of a merchant vessel.

CONCLUSION

In any application or interpretation to be given the Act, it is clear to us that the Act requires the loss in suit to have an immediate relation to the employment of the vessel involved in merchant service. This is so whether the Act is to be read as providing a remedy for the enforcement of *in rem* liabilities only or if the Act is to be read as providing remedies for the enforcement of *in personam* and *in rem* liabilities. The libel here does not concern a loss arising out of the operation of a vessel in merchant service. The decision of the District Court, therefore, is correct and its decree should be affirmed.

Respectfully submitted.

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NOVEMBER, 1926.

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